

On August 8, 2014, respondent filed a Motion to Dismiss, citing K.S.A. 2011 Supp. 44-523(f)(2) and asserting the claim should be dismissed as the matter had not proceeded

to a regular hearing within one year of the Board's Order denying compensability. Respondent argued it was not aware of any good faith reason for the delay. Respondent requested an order dismissing the claim and reimbursement from the Kansas Workers Compensation Fund for all benefits paid. On August 14, 2014, claimant filed a Response in Opposition to Motion to Dismiss, setting forth her contentions of a good faith basis for the delay in not bringing the case to regular hearing within one year of the Board's Order, including claimant seeking medical treatment, undergoing back surgery and seeking medical and vocational opinions. A motion hearing was held on September 2, 2014, and ALJ Marchant entered the September 2, 2014, Order, which states in part:

Based on the foregoing, the Court finds that although the case has not proceeded to a Regular Hearing within one year of the Board of Appeals' Order denying compensability, Claimant has proven sufficient good faith reasons for the delay. There is no evidence that Claimant has been dilatory or at any time abandoned the case. Rather, the evidence demonstrates that Claimant has continually made a good faith effort to move her case along and prepare the evidence needed for litigation of the case and Regular Hearing, and in fact, a Prehearing Settlement Conference has already been scheduled. As a result, Respondent's Motion to Dismiss is denied.<sup>1</sup>

Respondent appeals and contends that pursuant to K.S.A. 2011 Supp. 44-523(f)(2), claimant's claim should be dismissed for lack of prosecution. Respondent argues claimant failed to prove the existence of good faith for her delay in bringing the matter to regular hearing within one year of the Board's Order denying compensability.

Claimant contends the Board lacks jurisdiction to review this matter. If the Board has jurisdiction, claimant asserts she proved a good faith reason for the delay in proceeding to regular hearing, including receiving medical treatment, accumulating evidence in support of her claim and meeting the requirements of a prehearing settlement conference.

The issues before the Board are:

1. Does the Board have jurisdiction to review this matter?
2. Should this claim be dismissed for lack of prosecution pursuant to K.S.A. 2011 Supp. 44-523(f)(2)?

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

---

<sup>1</sup> ALJ Order (Sept. 2, 2014) at 2.

At the September 2, 2014, motion hearing, the parties argued their positions, which are set forth above. Claimant's attorney indicated the Board reversed ALJ Clark's April 25, 2013, Order granting claimant medical treatment with Dr. Whitaker, including the doctor's recommended surgery. As a result, claimant obtained medical treatment on her own. Claimant saw Dr. Matthew N. Henry on August 6, 2013, regarding low back pain that radiated down both lower extremities. On September 13, 2013, Dr. Henry performed an L3-5 laminectomy and instrumented fusion on claimant. Claimant provided brief testimony concerning last seeing and being released by Dr. Henry, which was mid-January 2014.

Claimant's attorney represented that on February 20, 2014, he sought a prevailing factor opinion from Dr. Henry. The doctor needed additional information, as evidenced by his February 26, 2014, response to claimant's attorney. Dr. Henry sent a letter to claimant's attorney on March 10, 2014, with his prevailing factor opinion.

Claimant saw Dr. Pedro A. Murati at the request of her attorney on June 12, 2014, for opinions on prevailing factor, impairment/disability, restrictions and recommendations. Claimant's attorney pointed out it took additional time to get claimant an appointment with Dr. Murati.

Claimant's counsel argued it also took additional time for claimant to see vocational consultant Karen Crist Terrill and schedule a prehearing settlement conference. Claimant saw Ms. Terrill at the request of her attorney on July 16, 2014, for a task loss analysis and vocational expert opinions. Ms. Terrill sent a report dated July 17, 2014, to claimant's attorney.

Claimant filed a Certification for Mandatory Settlement Conference on July 22, 2014. A Notice of Prehearing Settlement Conference was filed by claimant on August 13, 2014, indicating a prehearing settlement conference would be held on September 15, 2014.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2011 Supp. 44-523(f)(2) states:

In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

The Board has jurisdiction to review decisions of administrative law judges only to the extent provided in the Act. The Board has jurisdiction to review preliminary hearing orders as to disputed issues of compensability as specifically set forth in K.S.A. 2011 Supp. 44-534a(a)(2). The Board also has jurisdiction to review preliminary hearing orders under K.S.A. 2011 Supp. 44-551(i)(2)(A) if it is alleged that the ALJ exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. Pursuant to K.S.A. 2011 Supp. 44-551(i)(1), the Board is provided with jurisdiction to review final orders, awards, or modifications of awards entered by an administrative law judge. Such jurisdiction does not generally extend to interlocutory orders.

The motion to dismiss filed by respondent is not one of the appealable issues set forth in K.S.A. 2011 Supp. 44-534a(a)(2). Nor did the ALJ exceed her authority in denying respondent's motion to dismiss. Therefore, K.S.A. 2011 Supp. 44-551(i)(2)(A) does not grant jurisdiction to the Board to consider respondent's appeal.

The Order of which respondent seeks review is not a preliminary hearing order. It is an order denying respondent's motion to dismiss the claim based on K.S.A. 2011 Supp. 44-523(f)(2). The Order is not a final order. Since the ALJ's order denying respondent's motion to dismiss is not a final order, but rather is interlocutory in nature, the Board lacks jurisdiction to review the merits of the issue raised by respondent.<sup>2</sup> When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>3</sup> Accordingly, respondent's application for Board review is dismissed.

#### **CONCLUSION**

1. The Board does not have jurisdiction at this point in the claim to review the ALJ's September 2, 2014, Order denying respondent's motion to dismiss.

2. Respondent's request for Board review must accordingly be dismissed for lack of jurisdiction.

**WHEREFORE**, the Board hereby dismisses respondent's application for Board review for lack of jurisdiction.

**IT IS SO ORDERED.**

---

<sup>2</sup> *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

<sup>3</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Dated this \_\_\_\_ day of November, 2014.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Brian R. Collignon, Attorney for Claimant  
brianc@pistotniklaw.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier  
kdonley@McDonaldTinker.com; pschweninger@mcdonaldtinker.com;  
cwise@mcdonaldtinker.com

Ali N. Marchant, Administrative Law Judge